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COPYRIGHT REMEDIES OUTLINE

[by A.M. Butler]

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COPYRIGHT REMEDIES

1. INTRODUCTION

1.1 Purpose

The purpose of this paper is to present recommendations for reform of the system of enforcing copyright in Canada in public policy terms.

1.2 The Policy Objective

The overall policy objective or aim of the enforcement program is taken to be to provide copyright owners and the copyright industries in Canada with as infringement free an environment as can reasonably be had consistent with due regard to efficiency, effectiveness and fairness to persons caught up in the enforcement process, whether innocently or otherwise.

1.3 Previous Studies

Canadian copyright law has been the subject of three government commissioned studies. The first was the Ilsley Royal Commission on Industrial and Intellectual Property which reported in 1960. The second was the January 1971 report on Intellectual and Industrial Property by the Economic Council of Canada. The third was a study commissioned by the Department of Consumer and Corporate Affairs entitled Copyright in Canada published

in April of 1977. This paper takes the recommendations of Copyright in Canada as its starting point, because it is the latest and the most thorough of the Canadian studies as they relate to enforcement and remedies. The recommendations made in Copyright in Canada in regards to enforcement and remedies are set forth in a schedule to this paper.

There is a subtle but important shift of policy from the Copyright in Canada. That study did not explicitly give us a central policy on enforcement, but the central policy perspective can be deduced from the recommendations made and the arguments advanced to support them. The study recommended the abolition of the "summary" or criminal remedies found in the present act, relying in part on the following:

> " ... (A)bolition would be consistent with the principle that copyright is a private right that should not be enforced by the government but rather by those who have a legal interest in obtaining redress for their infringed rights".(1)

This principle is accepted by this study, but a major sub-principle that appears to flow from it is not. If rights owners are to be the instrument by means of which copyright is to be enforced, it might seem to follow that they should bear the burden of enforcement in the form of risk and expense. This is not accepted, because if copyright owners are made the instrument of enforcement, but

they do not assert their rights, then a satisfactory infringement free environment will be placed at risk. Rather, it is suggested that if rights owners are to be the instrument of enforcement, that is to say, if they are to be the means towards a community objective, the burden of enforcement should be shifted from them to the degree possible, giving due regard to fairness to other persons caught up in the enforcement process. Barriers to private enforcement should be reduced, and to a degree, enforcement proceedings should be encouraged.

This violates a widely held view of public policy, that litigation is an undesirable activity that should be discouraged. But infringement suits are likely to be few in number, and it would appear to follow from the establishment of copyright to encourage creation, that the burdens of the systems should fall on persons other than creators. Moreover, in as much as copyright is enforced, the burden and expense will eventually be shifted onto distributors, retailers and end users, as defendants or as purchasers of goods or services into the price of which the cost of enforcement has been incorporated. If it achieves greater efficiency and effectiveness, it makes sense to impose this cost in a more direct manner.

2. STRATEGY IN MAKING POLICY

The recommendations set out in 6 are selected from a large number of possible measures on the basis of the following overall strategies. Private enforcement of private rights should be the basic policy mechanism. This means that the incentives for enforcement of private rights must be sufficient to achieve the general policy objective of an infringement free environment, which means that rights owners must be encouraged to do more than the bare minimum necessary to protect their individual rights or to collect compensation when they have been injured. Moreover, policy must be shaped with the typical rather than the exceptional in mind. Specifically, although previous studies have relied heavily on observations and recommendations arising out of decided cases, decided cases are the exception, most copyright desputes being resolved without judicial intervention. The case load might be described as a pyramid with the decided cases located at the tip and the typical cases located at the base. Rules calculated to facilitate settlement may not be appropriate for judicial decisions and vice versa, but if a rule is to be chosen, common sense would suggest it be tailored to the typical. An overall theme of the recommendations contained in this paper is that the rules be weighed in favour of plaintiffs in pretrial proceedings to encourage settlement.

Another major consideration is that some measures may accomplish several objectives while other measures may accomplish only one. This seems fairly obvious, but it is frequently forgotten. Consideration of measures aimed at compensation, deterrence and prevention illustrate this.

These three terms are frequently used almost interchangeably, as if measures calculated to achieve one of these objectives will achieve the others as well. But this does not necessarily follow. Probably only prevention achieves the other two, and then perhaps largely by making them unnecessary. Compensation and deterrence posit a degree of failure. Prevention may be possible in copyright because in most cases infringement is very vulnerable at the points of distribution and sale, and in other cases, infringement occurs under regulated circumstances, for example, in the broadcasting industry. So one of the recommendations will be that remedies be available against distributors and retailers because of the effectiveness of such measures. This is a measure directed at prevention and deterrence, but it delivers a very high level of compensation as well.

3. CRITERIA FOR EVALUATING POLICY

Like the considerations touched on above, the following appear obvious when they are set down. What is not obvious is that they should be set down, and that the criteria are as numerous as they are.

3.1 Likely Effectiveness

This is probably the most obvious criterion. Its importance for owners and the community is obvious. What is less obvious is the interest of potential defendants. Any scheme of enforcement implies costs imposed on distributors, retailers, creators, users, etc. They have an interest in requiring that these costs be justified by the results achieved.

3.2 Economy of Effort

How much effort and expense is required to achieve the desired result? This is a criterion that weighs heavily in favour of civil enforcement and pretrial settlement as opposed to criminal proceedings.

3.3 Flexibility and Concentration of Effort

When particular problems arise, such as numerous and widespread infringements, how well does the enforcement scheme react to the challenge and

how quickly can enforcement resources be brought to bear against it?

3.4 Expectations Created and Met

What are the performance expectations the law is likely to generate? How well will they be met? Are some of the likely expectations unrealistic?

3.5 Fairness and Equity

The setting of a remedies policy is likely to depend heavily on normative considerations. In fact, when pressed, most people concerned about copyright will reveal highly moralistic views even though elaborate economic rationale are frequently advanced for copyright. Generally speaking, there is a tendency, and a quite human one, to look favourably on extending copyright to cover new media or situations but there is also a reluctance to take a hard line in enforcement. Plaintiffs and defendants, at least non deliberate defendants, will frequently come from the same groups within the copyright industries.

A major stumbling block is the treatment of "innocent" parties. To what degree will policy makers be prepared to impose liability on defendants regardless

of their fault. The normative reaction of most people will be that there should be no liability in the absence of fault, or that it should be restricted to profits actually made. There is likely to be strong sympathy for such an approach from some persons within the copyright industries. It seems fair, and besides, who are the likely defendants? They are obviously people to whom many of the rights are extended in the first place. It is only natural that publishers, etc. should be in favour of the creation of rights, but they must also have reservations as to how vigorously they should be enforced, since they run the risk of being defendants. A normative approach suggests that wide powers should be given to judges to do what is fair in individual cases in the light of the injury done and the fault exhibited. It is an approach that responds to the criterion of a fairness between actual parties in cases decided by a judges or in a settlement constructed by lawyers on the basis of what they believe a judge will do. It is a very valid and obvious approach, but it is not the only one. It is, of course, the approach towards which the observations in 2 are primarily directed. It distorts policy because it responds to the exception rather than to the rule and there are grave reasons to doubt its ability to achieve multiple objectives and community objectives for reasons of risk, delay and expense. This can be illustrated by the issue of innocence as a defence. If liability is strict, then,

under a set of fairly clear circumstances, a copyright owner will know with a fair degree of certainty that he will prevail in litigation and that he will recover enough by way of costs and damages to cover his expenses. If innocence is a defence, then a copyright owner must face the risk of a defendant establishing his innocence at trial, with the result that the copyright owner will end up paying all his own expenses and he will also have to pay the defendant's costs as well. There is also the problem of delay. If there is to be a true defence of innocence, the defence cannot be disposed of without a trial, and this means a delay in the order of eighteen months or more before judgement, with all the resultant expense and risks outstanding. This can be contrasted with a scheme where liability is strict, that is to say, innocence is no defence, and the amount of compensation is calculated by a preset formula, such as a percentage of the sale price of an infringing article. Under such a scheme, where a plaintiff has a clear right and infringement is obvious, proceedings can be brought to a close quickly because formal trial proceedings can be avoided. If proceedings are too risky, too slow and too expensive, copyright owners will be discouraged from suing in cases of infringement and potential infringers will thus not be disuaded. An obvious way of bridging the gap between the desire for fairness and the policy of creating an infringement free environment, is to create

strict liability for a limited amount, an amount set high enough to reduce risk and encourage copyright owners to sue, yet set low enough so that it does not present unreasonable risks or impose undue hardship on persons dealing in copyright material in the course of trade. Such a strict but limited liability will be a major recommendation in 6.

It will be advanced because it is a practical means to the desired policy objective. It also responds to most of the considerations of fairness that immediately follow.

3.5.1 Fairness Between Plaintiffs and Defendants

This is the most obvious consideration in assessing fairness, and it is probably the only one that most people will consider. It has been alluded to above. The major recommendation of this paper, strict but limited liability, fairs poorly when examined by this criterion. This criterion would seem to indicate that a copyright owner should be entitled to a remedy only when he has been injured in the sense that he has suffered from some loss and that a defendant should be obliged to pay compensation only when it is shown that he is guilty of some fault and, even then, he should only pay to the degree he has profited or the plaintiff has suffered a loss. It is a criterion that implies a minimum of intervention.

Policy makers must decide whether this consideration is to control policy, and if not, what weight it is to be given. It is suggested that it be given minor weight and that it not control policy because it interferes as a practical matter with the objective of an infringement free environment when it controls policy. Moreover, policies based upon this consideration score badly in relation to other major fairness criteria.

3.5.2 Fairness Between Copyright Owners as a Class and Infringers as a Class

There are several possible reactions to this consideration. The first is that neither class should be able to interfere with the activities of the other class unless it is absolutely necessary. This may have been the premise behind much of the recommendations of Copyright in Canada.

The difficulty with this approach is that, by creating copyright, the community has created the risk of interference with the activities of users, and users, by dealing in copyright articles, have created the risk of infringement, and thus each class is, of necessity, interfering with the other.

An alternative approach is to ask where the risk of infringement should lie. Lawyers with experience

in personal injury claims will assume that it should fall on the class whose members are best able to absorb the loss. But it is difficult to identify which class that is, since a given creator or publisher may or may not be better able to absorb or distribute a loss than another publisher who infringes or a distributor or a retailer. On balance though, if liability is kept within reason, users, in the form of publishers, distributors and retailers, may be better able to absorb the loss since activities that infringe will usually bring them benefits as well, but a creator may have not such consolation.

Another alternative is to attempt to split the risk so that a part of it falls on each class. To a degree this is inevitable given the fact that no system works perfectly and that members of each class will have to discount their respective positions in the knowledge that judicial proceedings are risky. This is essentially the result of policies responding to 4.5.1. The user class pays compensation for injury done through actual fault and also pays to be free of litigation and plaintiffs discount their claims to avoid risk and delay.

A better approach can be found in the pragmatic question, where does the burden eventually come to rest?

It is suggested that the burden is eventually

imposed on users, in as much as copyright transfers its costs on to users. In principle, to the degree that the cost is not eventually transferred to users, the system can be said to have failed. Put differently, users will inevitably pay in terms of higher costs or less choice because of lower productivity.

With all of this in mind, it may be a matter of indifference to users as a class, so long as what is done is done efficiently. This raises the question as to how the burden should be shifted, if at all. Again, there are several approaches, each with a varying degree of effectiveness and efficiency. One is to increase the size of potential damage awards by encouraging judges to grant increased awards in response to factors such as the cost and risk of enforcement or the degree of fault on the part of defendants. This approach encourages plaintiffs by improving the odds because the potential prize is greater, but it tends to leave the risk very much the same and, therefore, responds more to plaintiffs that can already afford the risks. Another approach is to shift the burden of proof onto defendants on questions such as the existence and ownership of copyright, innocence, etc. This is a policy actively pursued in the present statute and it has considerable support in tort law generally, that is to say, in the judge-made law governing personal injury, etc., where an effort has been made over the years to shift the burden of proof onto manufacturers of dangerous articles, doctors,

drivers of automobiles, etc. In the latter case, this has been frequently done by statute. For example, it is not uncommon for drivers of automobiles to be presumed negligent when they strike pedestrians. The difficulty with this approach lies in its half-hearted nature. It essentially involves risk-sharing, since unless a dispute goes to trial, or a case is open and shut, the parties and their lawyers will have to calculate the risks and formulate a settlement based upon the overall value of the claim. This creates an incentive to take court proceedings at least as far as discovery in order to have the maximum information on which to base a settlement. This implies expense.

An alternative, of course, is strict liability for a limited amount established either absolutely, or by some preset formula. This is what will be recommended. It can be described as a statutory approach because, under modern conditions, when legislatures have addressed such matters, they have tended to impose strict liability.(2)

3.5.3 Fairness Between Copyright Owners as a Class

Legal proceedings are expensive, and proceedings requiring a judicial determination are the most expensive and involve the greatest risk. Expense and risk will be dealt with in 3.7. For present purposes, it must be emphasized that a policy of complete fairness between plaintiffs and defendants tends to exclude smaller and

poorer plaintiffs from relief because of expense. This alone is good reason to doubt the appropriateness of a policy based solely on this approach since the primary objects of copyright policy in Canada, Canadian creators, publishers, etc., are likely to fall more frequently into the class of small, rather than large plaintiffs. The approach also fails to deliver equality within the class of plaintiffs who go to trial because a substantial number will not be blessed with solvent non absconding defendants possessing the requisite degree of fault so is little equality of result.

Strict liability meets many of these concerns by reducing risk and delay. If copyright owners are entilted to summary judgment for a liquidated sum, without prejudice to their rights to pursue other claims, monies collected on summary judgment can be used to finance further litigation.

In this regard, experience in the air transport industry is instructive. The dependents of air crash victims are entitled to a statutory amount by way of compensation, regardless of fault, pursuant to the Warsaw Convention. It is common practice to use this money to finance further claims against airlines, manufacturers, etc., in negligence. The existence of a similar structure in Copyright will tend to equalize the relative portions of large and small rights owners.

3.5.4 Equality as Between Defendants

Equality of treatment between defendants is important as well. Most people will assume that if defendants are liable only when they are at fault, and then only to the limit of actual damage, then fairness to defendants within their class flows naturally. But this is not so. It is in the nature of things that judicial error will result in some truly innocent defendants being found liable and many truly guilty infringers will escape. Moreover, the measure of damages is such that a very large judgement may be rendered in relation to a very small lapse, while a small one may be handed down in a very serious case, because the actual damage to a plaintiff may bear no relation to the condition of the defendant. A defendant can be doubly damned; first, because he is forced to pay substantial damages, and secondly, because his competitors are not. So there is something to be said for an approach that expands the number of people likely to be sued while reducing the extent of their individual liability. Copyright can be seen as a branch of commercial law and equality of treatment of defendants is desirable to protect competition.

The issue of risk to defendants can be illustrated by two leading cases on damages. In The Waggon Mound,(3) the defendants argued that they could not be held liable for the fire that damaged Mort's dock because it could not be foreseen that the fuel oil they let leak into Sydney Harbour could

ignite and burn on sea water. The Privy Council held that that did not matter, since it was foreseeable that the oil could foul the slipways, and that once some injury could be foreseen, it did not matter whether the mechanism by which the injury actually occured or its extent could be foreseen or not. Similarly, in copyright, a simple transgression could result in enormous damage. For example, the publication of an infringing edition of a work might cast doubt on the title of the true owner and result in the loss of a valuable publishing or adaptation contract.

A second decision illustrates the matter further. In Victoria Laundries[4] the defendants broke their contract to supply a laundry boiler through late delivery, with the result that a large government contract for the cleaning of uniforms was lost. The Court held that liability was restricted to the sort of damages that could be foreseen if the contract was broken, in the eyes of the parties at the time the contract was made. In other words, the extent of liability in contract is restricted to accepted risks. Greater equality among defendants can be achieved through the Victoria Laundries approach, a contract or commercial case, rather than the tort law approach of The Waggon Mound. Copyright infringement is usually classified as a tort, but if there is to be liability for persons dealing in articles in the absence of deliberate infringement, some limitation on liability seems desirable. In tort law,

defendants are usually insured, and the courts know this. Also, in commercial cases, there is an absolute practical limit to liability when defendants are incorporated. In one area of tort law, accidents at sea, there is a limit to liability somewhat similar to that established under section 21 of the present Copyright Act where liability is limited to the value of the infringing goods. The liability of ship owners is usually limited to the value of the ship.

Fairness between defendants would also seem to demand that innocent defendants, or at least the more innocent defendants, be able to shift all or most of the cost onto the most responsible or guilty of infringers. Since guilty infringers have a propensity to abscond or go bankrupt, there is much to be said for some quick way of establishing the extent of liability so that less blameworthy defendants can have the maximum chance to recover their losses from the more blameworthy ones.

3.6 Delay and Risk

Litigation can be expensive, although it need not be in all cases. Proposals that may seem hardnosed may deliver more by way of fairness because they are cheaper and faster. Cost and risk will be developed further in 4.6, and it suffices to suggest that efficiency and effectiveness can buy a lot of equity.

3.7 Variance

A major recommendation of this study will be the continuation in a modified form of the statutory damages and strict liability of present section 21 which provides for seizure of infringing copies and damages measured as the value of the goods sold. Such measures are unattractive because they are arbitrary. If damages are measured as a fraction of the price of an infringing article, then in a majority of cases it will be either too great or too little when compared to a more "equitable" standard such as actual loss to the plaintiff or actual profits to the infringer or a quantum meruit award based on the value to the defendant of what is taken. But all these measures are arbitrary. Damages, profits and quantum meruit appear less arbitrary because they are more vague. But a plaintiff or defendant will find a scale to be more or less acceptable depending on whether it yields more or less money than some other measure. It will be recommended that a new statute simply "split the difference" that is to say set an arbitrary figure lying somewhere between various "equitable" measures, but essentially chosen and set to achieve the community interest in an infringement free environment, that is to say set high enough to rob infringement of its profitability.

Such a measure will be compared unfavourably with a measure left more in the hands of judicial discretion. But a criticism of a proposal is only so good as it shows a

proposal to be inferior to some other measure or no measure at all. An arbitrary figure accepts the likelihood that the measure of damages will vary from the desired norm a substantial part of the time. Measures of damages requiring judicial determination will appear on their face to be more equitable, but it is questionable as to whether they will perform better in practice. Judges make mistakes, and the risk run with judicially determined awards is that in exchange for their being correct most of the time, they will be substantially wrong some of the time. This means in practice that most parties will settle, as they do, and plaintiffs will have to discount their claims for delay and error, and defendants will pay money to buy their way out of risk.

All this means that there is an inevitable variance from the desired norm and one must weigh statutory inflexibility against judicial hazards.

3.8 Accountability

In Canada, whatever method of enforcement is chosen, the department responsible for the Copyright Act and the officials advising the department in relation to policy must accept responsibility for the effectiveness of the scheme. This is a concern which probably does not

occur to academics or interest groups within the copyright industries seeking to influence enforcement policy. But it is an important consideration and a very useful one in resolving competing equities as described in 3.5 and a major consideration in settling the policy recommended in this paper. Constitutionally, this is as it should be. The policy should not be one that favours one interest group over another but rather one that can be defended in practice and justified in the community. This probably means that if the policy errs, it should do so in favour of effectiveness.

4. CIVIL REMEDIES

Describing the present Canadian law is a difficult task. The present statute appears to create a code of enforcement, and the various parts of the statute, with some clear lapses, seem quite clear. The problem is that the parts do not fit together to form a coherent whole, and this becomes apparent when one tries to evaluate the present law and the policies behind it for purposes of revision. It does not fit together as a whole and different conclusions will be reached on the various issues, depending on which point in the present statute is used as a starting point.

Major policies are unclear, and when attempts are made to elaborate particular policies in light of the statutory provisions, startling anomalies and contradictions arise. Specifically, the statute is unclear as to whether remedies are cumulative and overlapping, whether liability is strict: It is also very unclear as to what the status is of imported goods and what liability attaches to persons dealing in them. The description and interpretation of the statute that follows is a working description, created for the purposes of enabling policy makers to create further copyright policy. The description responds to the policy criteria in 3 and tries to present

the present law in terms of those criteria. The recommendations are evolved largely from the existing law.

4.1 What Constitutes Infringement

It is probably better to begin with the major practical provision, Section 21. It reads as follows:

> Ownership of copies, plates, etc
>
> **21.** All infringing copies of any work in which copyright subsists, or of any substantial part thereof, and all plates used or intended to be used for the production of such infringing copies, shall be deemed to be the property of the owner of the copyright, who accordingly may take proceedings for the recovery of the possession thereof or in respect of the conversion thereof. R.S., c. 55, s. 21.

Section 21 is the major provision because its remedies are generally stronger and more expeditious than the other seemingly more major provisions, with the result that the other provisions will come into play only when section 21 does not apply or when the other provisions offer a greater remedy than section 21, which may not be frequent. A major area where section 21 will not apply is in relation to public performances because there may not be an infringing article involved that can be seized to "stop the show".

Because infringing copies are deemed to be the property of the copyright owner, the owner can use the

various summary procedures available under provincial law to recover personal property. In Ontario this means seizure without prior notice on posting a bond, seizure by order of the court after notice has been given or judgement for delivery up upon failure to show a triable issue on the part of the defendant. Quebec has similar procedures and one of the clear purposes of section 21 is to plug the Copyright Act into provincial enforcement procedures by giving copyright owners access to the same remedies as are available to other owners of property.

Liability under section 21 appears to be strict because liability is strict under the law of conversion, even as to innocent parties dealing in converted goods. This means that persons dealing in infringing copies are liable to the remedies imposed by section 21, regardless of their knowledge or degree of fault. They need know nothing about the source of the goods or that they infringe.(5) If they have parted with the goods, they must pay damages equal to the price of the goods sold. This introduces a major anomaly, since the price charged by an innocent retailer will be greater than that charged by a more guilty distributor or the actual infringer himself. This also argues for a substantial modification of section 21 on the grounds of equity, although it should be pointed out that the infringer will eventually pay the whole amount if the retailer recovers against him. It

is a very tough law. But there are problems.

Firstly, there is some doubt as to whether records, tapes or video discs are "copies" or merely contrivances by means of which a work may be performed. A greater problem is found in the definition of "infringing" as in "infringing copy". It is found in section 2 and reads as follows:

> "'Infringing', when applied to a copy of a work in which copyright subsists, means any copy, including any colourable imitation, made or imported in contravention of this Act".

If the Act is read broadly, this would seem to cover any article, the making of which is the exclusive right of the copyright owner. It would also seem to cover works on Schedule C of the Customs Tariff pursuant to sections 27 and 28(1). These sections are considered further under 4.8, but it suffices to say that in regards to similar provisions in the Act of 1911, the House of Lords concluded that goods imported contrary to the English equivalent to sections 27 and 28(1) are not imported contrary to the Copyright Act because those sections form part of the Customs Tariff Statute.(6) This view was adopted uncritically by Dr. Fox in his work on Canadian Copyright, but he is probably in error because the wording relied on by the House of Lords has never appeared in the Canadian statute. But the scope of sections 27 and 28(1) is very narrow and resort must be had to the criminal provisions of

section 25(1)(e) that makes it an offence to knowingly import an infringing copy for sale or hire. Leaving aside what constitutes an infringing copy under such circumstances, it can be pointed out that in order to succeed under section 21 against an inland infringement, a plaintiff need only show it infringes. He need not show the state of mind of any one dealing in the article, nor need he show the state of mind of the person who copies. In the case of imported infringements, unless Schedule C applies, the plaintiff must show the knowledge of the importer at the time of importation even as against a downstream retailer or distributor. Thus a retailer would be caught if the importer were guilty, but he would not be caught if the importer is innocent. The actual knowledge of the retailer is irrelevant and the impact on the retailer entirely capricious. His liability is strict, but only when someone else is guilty.

Since most copyrighted works in circulation in Canada are authored by foreigners, this disparity of treatment between inland and imported piracies is a major anomaly since a large number of piracies can be expected to enter Canada from abroad. At the same time, as has been stated above, the consequences of a finding of liability under section 21 as against an innocent retailer or distributor is also anomalous and the measure of damages is excessive.

The extension of limited strict liability along the lines of section 21 against all infringing articles regardless of medium or origin would be a reasonable compromise and adjustment of the present law. If liability in the absence of fault were restricted to some fraction of the price of the goods, the balance between owners and users in the form of distributors and retailers would be roughly the same, but the coverage of the law would be more consistent. Moreover, if the scale of liability approximated typical likely damage, or perhaps what a reasonable licensee would pay a reasonable licensor for the use of the copyright, the problems associated with defining a "copy" could be reduced, perhaps ignored. As things presently stand, the wording of section 2 suggests that "copy" is to be given its ordinary meaning, that of substantial similarity detectible to the human senses, and not an adaptation.

The statute also defines infringement in terms of infringing acts, beginning with the exclusive right as set forth in section 3(1) which reads as follows:

3. (1) For the purposes of this Act, "copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof; and includes the sole right

(*a*) to produce, reproduce, perform or publish any translation of the work;

(*b*) in the case of a dramatic work, to convert it into a novel or other non-dramatic work;

(*c*) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise;

(*d*) in the case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered;

(*e*) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present such work by cinematograph, if the author has given such work an original character; but if such original character is absent the cinematographic production shall be protected as a photograph;

(*f*) in case of any literary, dramatic, musical or artistic work, to communicate such work by radio communication;

and to authorize any such acts as aforesaid.

Section 17(1) defines the act of infringement as:

> **17.** (1) Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything that, by this Act, only the owner of the copyright has the right to do.

All this seems to make liability strict and absolute, although there is a slight exception under section 22 which restricts liability to an injunction where "the defendant proves that at the date of the infringement he was not aware and had no reasonable ground for suspecting that copyright subsisted in the work". The exception is characterized as slight because it applies to cases where the defendant has no reason to believe a work to be in copyright, an unlikely event since the term is the life of the author plus fifty years. It does not absolve him merely because he does not know what he is doing infringes. Thus, he would be fully liable if he published under a licence obtained in good faith from someone who was not the owner of the copyright. Section 21 claims since they are strictly speaking "coversion" as opposed to "infringement" claims.(8) But even if section 22 applies its scope is so narrow that it is difficult to see what practical effect it would have.

Section 17(4) provides:

> (4) Copyright in a work shall also be deemed to be infringed by any person who
>
> (*a*) sells or lets for hire, or by way of trade exposes or offers for sale or hire;
>
> (*b*) distributes either for the purposes of trade, or to such an extent as to affect prejudicially the owner of the copyright;
>
> (*c*) by way of trade exhibits in public; or
>
> (*d*) imports for sale or hire into Canada;
>
> any work that to his knowledge infringes copyright or would infringe copyright if it had been made within Canada.

And section 17(5)

> (5) Copyright in a work shall also be deemed to be infringed by any person who for his private profit permits a theatre or other place of entertainment to be used for the performance in public of the work without the consent of the owner of the copyright, unless he was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement of copyright. R.S., c. 55, s. 17.

The remedies under section 21 have been described as being the major ones because the consequences to a defendant of a finding of liability under section 21 are usually far greater than those under the other sections of the Act. The other sections of the Act come into play when there are no infringing articles involved, where their value is relatively minor, or where through some peculiar circumstance, the actual damages or possible punitive award is greater than the section 21 measure.

If the modifications to section 21 suggested earlier

are adopted, the general liability to damages created under sections 17(1) and (4) will be more important because of the greater likelihood of actual damages exceeding the section 21 measure and it seems reasonable to assimilate importators into the class of direct infringers so that such a defendant will be available to plaintiffs in Canada in all cases. This would mean that importers would be strictly liable for actual damages. But this raises the question of authorized copies that enter Canada against the wishes of local copyright interests.

It is really beyond the scope of this study to argue whether there should or should not be an exclusive right to import works from abroad, an issue frequently described as "exhaustion". But there is a major practical problem. The wording of section 17(4) suggests that the importation of authorized works from abroad constitutes infringement under certain circumstances. Exactly what those circumstances are is difficult to say because the decided cases are contradictory.(9) They are contradictory because, although copyright owners are usually successful, no consistent general rule emerges, or at least the possible general rules distilled from some cases are inconsistent with the decisions in others. But it would appear that Canadian courts will treat an article as infringing if the party making the article in a foreign country is not also licenced or otherwise authorized to

make the article in Canada.[10] The problem this presents is that articles lawfully made in one country, principally the United States, will be infringements in Canada. When an article is a piracy in both countries, an importer found liable under the Canadian Copyright Act will have the right to claim compensation or set off his loss against accounts payable, if for no other reason than that the source of the goods has broken his warranty that the goods do not infringe.[11] In the case of copies lawfully made in the United States, there will be no such right against the ultimate source of the goods unless he is told that the goods are destined expressly for Canada. Even then, it would be an open question as to who would be responsible to see that the goods did not infringe in Canada. Therefore, whatever the rule may be in relation to piracies, in the case of authorized goods made abroad, equity would seem to demand that importers not be liable unless they know the goods infringe in Canada, and it would seem that in any event, liability should be restricted to actual damage. If actual damage is not a prerequisite, there will be an incentive to engage in market segregation, even though there is no economic justification for it. The incentive to sue is designed to create an infringement free environment, not a segregated market.

Various theoretical and practical reasons are advanced for market segregation, but from an enforcement point of view, to the degree the arguments are valid, the harm that results from importation of authorized works from abroad is harm to distributors and publishers or manufacturers who find their marketing efforts embarassed by such importation. It follows that the cause of action to prevent such imports and to claim compensation should be restricted to distributors or manufacturers and publishers for harm done to them. If recovery is restricted to persons actually damaged and to actual damages against persons who are aware that the goods are not to be imported, the cause of action is really one for Unfair Competition, and although it can properly form part of a copyright scheme, it can be seen as not being a copyright per se and there may be no need to extend the same term in regards to this right as there is with copyright generally. The term might be restricted to a term approximately the typical commercial lifespan of a work.

4.2 How are Damages Calculated

"Damages" is an inappropriate term. "Pecuniary compensation" or "pecuniary award" might be a better one. Section 21 damages have been discussed at length. They are measured at the time the infringing articles are "converted", which usually means when they are sold. In the Caxton[12] case the infringing copies were sheets to

be incorporated into a larger publication, and they were taken to have been converted at the time they were bound into the larger publication and their value assessed at the time of binding. Caxton says that damages are cummulative but not overlapping, although a plain reading of the statute suggests that they are supposed to be cummulative and overlapping. Section 20(4) provides for the award of profits in addition to damages at the court's discretion in the case of infringement as opposed to section 21 claims, and in this respect the Canadian Act differs from the Act of 1911. In proving profits, a plaintiff need only prove gross receipts and section 20(4) then requires a defendant to strictly prove all his expenses. Tough though this may seem, under modern and competitive business conditions where infringers will frequently operate on borrowed money, an accounting of profits may not yield very much. Besides, a plaintiff will not know the rate of profits in advance. If we assume a net profit on sales of five percent, to give an example, and if we assume a threshold of $10,000 before a plaintiff will sue, then infringing sales would have to be in the order of $200,000. So an accounting of profits is not a very powerful policy tool.

The basic measure of damages as opposed to section 21 damages is usually expressed as the depreciation of the value of the copyright as a chose in action, in other words, the decrease in its value as a right which can be bought and sold. This really does not tell us very much, because there may be no established market for an infringed work, and even if there is, there might not be an easy way of establishing its value in that market or proving the degree to which the value has been depreciated. So a better way of expressing it is that the plaintiff is entitled to an award which reflects and is the greater of the various methods of calculating the loss. This includes lost sales on stock on hand, lost profits on stock not on hand but which could have been sold, lost royalties and licensing fees, consequential damage such as losses on future sales because infringing competition forced a lowering of price that can not later be raised and loss of business opportunity or good will through not being able to use the exclusive right to expand or attract business or through loss of sales on adaptation rights because title to the exclusive right has been put in doubt.

What may or may not be provided for under the present law is an award based on quantum meruit or what the right was worth to the defendant or what others would have been prepared to pay to exercise the right in the market place. It may not be available because the courts see it as a form of compensation not allowed for under the statute. Nonetheless, quantum meruit may form a sound policy because, in many cases, plaintiffs will be able to produce evidence of past experience by themselves and their competitors, and defendants will be obliged to admit what they have paid in the past for similar rights when they are examined on discovery.

Finally, courts may have a very broad power to award purely statutory damages in the absence of any showing of actual damage. In Ontario, for example, courts may award damages in lieu of or in addition to an injunction(13) and the Federal Court has made substantial notional awards. In other words, there may be a broad power to shape a broad pecuniary award when all else fails. As well, the courts have the power to award punitive or exemplary damages to express community displeasure with high handed conduct by infringers. Exemplary damages are thought by some to be a substantial deterrent to infringement.(14) This seems unlikely, since the delay involved in imposing this remedy makes it remote, and when it has been imposed, its scale seems modest in comparison

with other remedies.[15]

4.3 Civil Procedure

Policy makers have to understand, at least to a limited degree, how civil courts function. They also have to understand that there are subtle differences between Canadian laws of procedure and evidence when compared with foreign laws, particularly those of the United Kingdom and the United States. There is a perception and expectation in the community that Canadian law is much like that of those two countries and it is, therefore, expected that problems faced by copyright owners in those countries also occur in Canada and the solutions developed abroad will have application in Canada. This may or may not be the case. Another perception is the popular view of the legal process derived from popular culture, that is to say, the copyright industries themselves. There are a lot of representations of the criminal process in our culture, most of them originating in the United States, and it is natural for people to assume that the limitations of the criminal process apply to civil proceedings which may be looked upon as merely a weaker and less effective remedy than sending in the police.

Another perception is that copyright is so specialized and different a subject that the legal system could not possibly have devised adequate general rules to

apply in copyright cases. One can ask, how does a publisher go about recovering damages against a distributor or retailer dealing in infringing articles. The answer is very much in the same way as he would go about collecting damages against a distributor who fails to pay his account or who passes a bad cheque. Similarly, infringing articles can be seized very much as other articles can be seized by banks or other lenders exercising their security under lending agreements.

Up to this point, the study has dealt with enforcement on a fairly abstract level. But it is important for policy makers to understand the "nuts and bolts" of the operation in sufficient detail to enable them to assess the practical workability of enforcement mechanisms. Most people think of courts as being made up of judges and lawyers performing in quaint costumes in large and ornate rooms. But this is the exception. Most of a court's business is handled by clerks across the counter in the court registry. So, for its first principle of administration, a civil court assumes a defendant to be liable until he does something to establish the contrary. To give an example, in Ontario, a copyright owner relying on section 21 of the Copyright Act can issue a writ of summons calling upon a defendant to surrender infringing copies and this may include a claim for conversion damages.[16] If within 15 days of being served with the writ, the defendant does not deliver an

affidavit establishing the facts he relies on to assert a defence, the plaintiff can apply to the court registry for judgment and a writ of execution under which the Sheriff will seize the infringing articles and other property from the defendant to pay the plaintiff's costs and any pecuniary award. This is all done at the level of minor court officials without judicial intervention, and it can be done without a lawyer going anywhere near the court. Similar procedures are available in Quebec(17). A minority of cases escape this procedure and they are handled at an intermediate level within the court system. These are cases involving issues of fact or law which can be handled in a summary way by a judge without a full trial or by a junior judicial official, usually called a "master". Cases which escape this process will go on to more advanced stages.

For present purposes, the following assessment can be made. If one leaves aside exotic and largely non-cultural industry cases, such as those where plaintiffs claim that defendants are in possession of private and secret documents containing trade secrets belonging to the plaintiffs, it is inherent in copyright matters that infringers must deal with the public by arranging for the sale of infringing articles or by arranging infringing public performances. It is at its point of contact with the public that infringement is most vulnerable.

If the law provides that copyright owners are entitled to seize infringing articles and means of infringement, regardless of the state of mind of persons who deal in them, and if copyright owners are also given a right to recover a pecuniary award, calculated in a manner suitable for the establishment of the amount of a judgement by court officials in a summary way, then the business environment for infringement will be poor.

Initially, such a policy does not distinguish betweeen innocent and deliberate infringers, but the policy has a cummulative effect. Innocent infringers will be caught on isolated transactions, but deliberate infringers will be repeatedly sued, and, therefore, driven out of business. Retailers and distributors will force the cost back on the sources of the goods and infringers will be denied access to the public as distributors and retailers will refuse to deal with them.

This is the policy behind present section 21. Its effectiveness explains why civil remedies are to be preferred over criminal sanctions. They strike infringement where it is weakest and most vulnerable.

Not all cases will be disposed of as easily as described above. If a defendant is determined, he can

usually establish a right to defend, although if he is a systematic infringer, the weight of litigation will soon put him under. There will also be cases where the plaintiff's claim is in doubt and cases where no seizable object is involved. In other cases, determined infringers may hide or dispose of stock before normal procedures can stop them. The law makes provision for this. Plaintiffs can apply to abridge the normal delays. If they are willing to accept financial responsibility, they can apply to have articles seized. Where their case is clear, they can obtain injunctions restraining infringers prior to trial and in appropriate cases, this can be done without notice to the defendant.

Even in doubtful cases, plaintiffs can obtain injunctions restraining defendants prior to trial. Until recently, it was believed that before a plaintiff could obtain an injunction in an arguable case, he had to show that he had a strong primae facie case and that the balance of convenience favoured him in that there would be irreparable harm if the defendant was not restrained and that damage to the plaintiff would exceed that to the defendant in granting the injunction. Canadian courts now favour the decision of the House of Lords in Ethicon.[18] This case stands for the proposition that the plaintiff need only show a strong arguable case before the balance of convenience will be examined. American courts still

follow the old rule, and frequently copyright interests will assume that problems faced in this regards in the United States also exist in Canada. The significance of Ethicon is that it tends to reduce the importance of many of the statutory presumptions of fact, such as existence and ownership, because they are no longer as necessary in establishing the right to an injunction prior to trial. This is not an attack on presumptions, but rather a reason for doubting that they form a very effective policy tool.

The next thing that policy makers should know is that unlike criminal proceedings where the Crown must establish its case beyond a reasonable doubt, in civil proceedings, facts need only be proven on the balance of probabilities. In other words, a party relying on a fact must only show that its existence is more likely than not. It is trite law that "he who asserts must prove", that is to say that in the absence of some rule or statutory presumption to the contrary, the burden of proof of a fact falls on the party asserting the fact, but the exceptions tend to override the rule, and the way the system tends to work in fact is that the burden comes to rest on the party best able to prove or disprove a fact. So for policy making purposes, it is essential to know that it is far easier to prove a civil than a criminal case. The next three points illustrate this.

Civil proceedings in Canada are not accusatorial like criminal proceedings, at least outside Quebec. They are inquisitorial. Why Quebec is an exception in practice, at least to a degree, will be explained below. The proceedings are inquisitorial because parties have the right to interrogate opposing parties on oath prior to trial. This is known as examination on discovery. It usually takes place orally and the Canadian procedure is a compromise between the English practice where the examination takes the form of written interrogatories and written answers and the U.S. Practice where the parties and witnesses are examined prior to trial. The English practice has obvious limitations since the answers are prepared by the lawyers as are the questions and this is probably one of the reasons for the tendency to insert presumptions of knowledge against defendants in English legislation. Written interrogatories and answers are not as likely to force admissions as is oral questioning.

The U.S. system is a little lavish and, therefore, expensive. In Canada it is the parties only who are examined with one exception. Where a plaintiff relies on an assigned right, the assignee can be examined as well. The Canadian practice is to require the examinee to testify as to his knowledge, information and belief. If a relevant question is put which a party cannot answer, he will be required to inform himself. The consequences of all this, among other things, is that much hearsay can be proven

through discovery, further strengthening the civil process as a vehicle for the protection of plaintiffs' rights.

At trial, a party can read in and rely on portions of an adverse party's discovery transcript. In Quebec, the whole of the transcript forms part of the court record and the court can read and rely on it all. Under such a rule, it is unlikely a party can improve its position by conducting discoveries and as a result the procedure is rarely used in Quebec courts, but it is available to Quebec plaintiffs who sue in the Federal Court of Canada.

The production of documents is part of the discovery process. In Canada, parties are required to produce documents that help or hinder their cases or those of other parties. It is common practice to prove these documents on examination of discovery to avoid further proof at trial.

All of this must be related to the law on self-incrimination. There may be a tendency to use reverse onus provisions and to resort to criminal proceedings because of the difficulties encountered in the U.K. and the U.S., because infringement can also be a crime. In those countries, parties cannot be forced to produce documents or to answer questions that will tend to show

that they are guilty of an offence. Thus there is a temptation to send in the police. In Canada, the rule is different. No witness can refuse to answer a question or to produce a document on the grounds that the answer or document may incriminate him, but in relation to his answers, if he seeks the "Protection of Evidence Act", the answers cannot be used against him in any other proceedings.[19] Again, this is further reason to believe that civil proceedings may be more effective in Canada than in other countries. As well, the Canadian rule on self-incrimination reflects a policy in favour of civil proceedings.

4.4 Presumptions

The term "presumption" is given a very broad meaning in this paper. It is used to cover questions as to what special provisions should be made for proof of facts within a revised statute on a number of diverse issues such as questions of who is to be the first owner of copyright, how it is to be transferred, how ownership is to be proved, etc.

Generally speaking, the questions of ownership are dealt with in section 12. Section 12(1) presumes the author to be the first owner of the copyright and section 12(4) limits assignment or other transfers to those who accomplish by written instruments. Other

provisions derogate from the presumptions that the author is first owner in the cases where works are made by employees during the course of employment and with engravings, photographs and portraits ordered by others. In such cases, the employer or the person who orders the works is taken to be the first owner in the absence of an agreement to the contrary. This is a very subtle area. If one reads section 12 as a whole, it becomes apparent that strict rule of assignment only in writing, found in subsection 4, is circumvented by fiddling with the rules as to who is the first owner. Barry Torno recommended that authors always be first owner and that all transfers, to be valid, would have to be in writing.[20] This would simplify things, since it may on occasion be a difficult question of fact as to whether an author created in the course of employment or whether there has been some agreement in relation to a photograph, etc. The question of ownership relates in part to section 12(6) which reads as follows:

> (6) Where, under any partial assignment of copyright, the assignee becomes entitled to any right comprised in copyright, the assignee, as respects the rights so assigned, and the assignor, as respects the rights not assigned, shall be treated for the purposes of this Act as the owner of the copyright, and this Act has effect accordingly.

This also has to be read in conjunction with section 20(5).

> (5) Where the author of a work is the first owner of the copyright therein, no assignment of the copyright, and no grant of any interest therein, made by him, otherwise than by will, after the 4th day of June 1921, is operative to vest in the assignee or grantee any rights with respect to the copyright in the work beyond the expiration of twenty-five years from the death of the author, and the reversionary interest in the copyright expectant on the termination of that period shall, on the death of the author, notwithstanding any agreement to the contrary, devolve on his legal representatives as part of his estate, and any agreement entered into by him as to the disposition of such reversionary interest is void; but nothing in this subsection shall be construed as applying to the assignment of the copyright in a collective work or a licence to publish a work or part of a work as part of a collective work

Ownership is a troublesome issue in court proceedings. Copyright generally seems to bring out the technical side of the judiciary, and this may be aggravated if enforcement policy is directed to "compensation" as opposed to "prevention". Certainly, if the purpose is compensation, then it stands to reason that a plaintiff should be forced to strictly prove his title. On the other hand, if the objective is prevention, then it seems to follow that the most important thing is that an obvious infringer be "pulled over" and the plaintiff, whether he is able to strictly prove his title or not, is an instrument to achieve that end. Having said that, the major inarticulated consideration surrounding the problem of proof of title may be the possibility of undisclosed potential

claimants who may later emerge to force a defendant to pay compensation a second time because he may have compensated the wrong person first time out. It may, therefore, be easier to enforce copyright if the revised law gives a defendant a complete release when he settles with someone who appears to be the copyright owner.

There is a series of per se presumptions under section 20(3):

> (3) In any action for infringement of copyright in any work, in which the defendant puts in issue either the existence of the copyright, or the title of the plaintiff thereto, then, in any such case,
>
> (a) the work shall, unless the contrary is proved, be presumed to be a work in which copyright subsists; and
>
> (b) the author of the work shall, unless the contrary is proved, be presumed to be the owner of the copyright;
>
> and where any such question is at issue, and no grant of the copyright or of an interest in the copyright, either by assignment or licence, has been registered under this Act, then, in any such case,
>
> (c) if a name purporting to be that of the author of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the author of the work; and
>
> **(d) if no name is so printed or indicated, or if the name so printed or indicated is not the author's true name or the name by which he is commonly known, and a name purporting to be that of the publisher or proprietor of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed, or indicated shall, unless the contrary is proved, be presumed to be the owner of the copyright in the work for the purpose of proceedings in respect of the infringement of copyright therein.**

The presumptions created under subsections (c) and (d) respond to Canada's obligations under Article 15 of the Berne Convention. It reads as follows:

> (c) if a name purporting to be that of the author of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the author of the work, and
> (d) if no name is so printed or indicated, or if the name so printed or indicated is not the author's true name or the name by which he is commonly known, and a name purporting to be that of the publisher or proprietor of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed, or indicated shall, unless the contrary is proved, be presumed to be the owner of the copyright in the work for the purpose of proceedings in respect of the infringement of copyright therein.

It seems clear that the presumption called for under Article 15 is a presumption in favour of an author or publisher as plaintiff. Subsections (c) and (d) do not contain this restriction, and as a result, in a case where a plaintiff sues under an assignment, he can be met with a defendant relying on these presumptions to show that the plaintiff is not the author.[21] The same can be said for the presumption under subsection (b). It seems to make more sense to follow the schemes set out in the Berne Convention, and extend the presumption in enforcement proceedings to authors and publishers as plaintiffs.

These various presumptions essentially appeal to common sense. Someone who is stated to be the author of a work in a published volume of the work, probably is the author

and the Canadian courts who will probably reach that conclusion without the presumptions set forth in the Copyright Act. At least, they are likely to do so under modern conditions. There is a presumption, both at common law and by statute, that statements or entries made in business documents in the ordinary course of business or trade are to be taken as being evidence of a truth of those statements or entries.(22)

The important thing to note is that not only does the existence of an entry constitute evidence, but its nonexistence can constitute evidence as well and it is in this context that presumptions must be seen.(23) It is tempting to assume that the presumptions found within the Copyright Act are a powerful mechanism for the enforcement of copyright, but they may not be. Copyright in Canada advocated that there be a presumption that transfer documents be proof of the truth of their contents.(24) If they qualify as business documents under the business documents rule, then they are proof of the truth of their contents. But they must face the tests laid down by the Evidence Acts. If a presumption as to the truth of contents of transfer documents is created under a revised statute, then the presumption will probably not survive an attack based upon other documents. If a publisher relying on a transfer document is unable to produce cancelled royalty cheques, entries in books of account, etc., that one would expect him to be able to produce if his claim for ownership is valid, then the presumption would be destroyed. A discovery process also makes the presumption somewhat redundant. So does the application of the rule in Ethicon because it reduces the importance of presumptions as to particular facts in interlocutory proceedings. But

it must be borne in mind that in one important jurisdiction, namely Quebec, it is not customary to hold examinations on discovery and thus, these presumptions may have considerable practical importance.

The presumptions are directed towards the proof of facts at trial. Because very little by way of evidence on the defendant's part can overcome a presumption, most plaintiffs would be well advised to have positive evidence of these various facts available at trial whenever possible. In essence, a presumption may be a trap. It can lure a plaintiff into a false sense of security, with the result of that the plaintiff will not have the necessary evidence available to meet light evidence advanced by a defendant. It might make more sense to have some mechanism by which questions as to who is to carry the onus of proof can be decided prior to the trial proceedings. Thus, by way of example, a plaintiff could be presumed to be the owner of copyright unless the defendant successfully applies to the court for leave to defend on the issue of title. If the defendant is successful on such an application, then the plaintiff would bear the burden of proving ownership and would have to lead evidence on ownership first. If the defendant is unsuccessful, then he would not be entitled to contest ownership at trial. As a practical matter, this would mean that the plaintiff would know prior to the trial whether he has to bring witnesses from abroad or not.

Another possible function of presumptions is to give copyright owners a "leg up" in enforcement proceedings, that is to say, to reduce the degree of risk they face in enforcing their copyright. This objective would probably be better met by the degree of strict but limited liability.

4.5 Moral Rights

Section 12.7 provides as follows:

> (7) Independently of the author's copyright, and even after the assignment, either wholly or partially, of the said copyright, the author has the right to claim authorship of the work, as well as the right to restrain any distortion, mutilation or other modification of the work that would be prejudicial to his honour or reputation. R.S., c. 55, s. 12.

Because of the way in which section 12(7) is worded, there is good reason to doubt whether a court can make a pecuniary award in addition to or in lieu of an injunction. Because moral rights may be used as a vehicle for harrassing or nuisance claims, it may not be desirable to shift the cost of enforcing moral rights off plaintiffs, yet it seems reasonable to give the courts power to make a pecuniary award to vindicate a moral right when it is violated. The question is whether there should be the same policy commitment to an environment free of violations of moral rights as there might be in relation to infringement of copyright generally.

4.6 Costs and Delay

Successful parties in Canada are awarded costs unless the court believes there is some reason to deny them costs. These costs probably perform the function of statutory damages in the United States, at least to some degree, because they reduce the financial barrier to litigation. As a general rule of thumb, a successful plaintiff will recover approximately two-thirds of his own lawyer's accounts as costs against the losing party. If he is unsuccessful, he will face a similiar award in favour of the defendant. It is unnecessary for policy makers to know the precise sums involved, and there would be great difficulties in giving exact figures which would apply generally across the country. What is important is that the sums can be substantial as can be the risk. To give a hypothetical example, if we assume that a plaintiff's lawyer submits an account of $10,000.00, then the plaintiff may recover between $6,000 and $7,000 in costs for a net outlay of $3,000 to $4,000. Leaving aside the cost of having money outstanding in the form of interim payments to his lawyer on account, even in the best of cases a plaintiff must hope to recover in excess of $3,000 to

$4,000 in such a case to break even. This can be described as the threshold at which enforcement can be expected to occur. This threshold will be driven upwards if proceedings go to trial, and it will be driven downwards if the system is keyed to termination of dispute in summary proceedings.

The risks are complicated and compounded by the fact that a defendant, solvent at the time proceedings are commenced, may be judgment proof at trial. Another risk is that the defendant may make payment into court and the plaintiff may recover less than that payment at trial and, therefore, be condemned to pay costs after payment in, although, in most cases, the claim for an injunction will preserve a plaintiff's right to costs. And, the most obvious risk is that a plaintiff will simply lose. This risk will be greatest under a law that does not impose strict liability.

If civil enforcement of copyright is to be an effective policy vehicle, the establishment of a low threshold is obviously desirable. If equality of treatment between rich and poor copyright owners is sought, it is obviously essential. At the same time, if the rights of innocent defendants are to be respected, and

by this are meant the rights of parties who are to be held liable even though they are not deliberate or direct infringers, they must be given the maximum chance to buy their way out of litigation by exercising the right to pay money into court, and this implies some means of accurately calculating a limited liability.

4.7 Collective Enforcement

One of the ways of lowering the threshold of enforcement is to amortize the costs and risks over a large number of rights owners and cases. This is what performing rights societies seek to do in enforcing copyright against places of public entertainment. Their job would be made easier if they could collect something by way of liquidated or statutory damages in summary proceedings.

There are two obvious ways of doing this. One would be to permit them to recover their actual enforcement costs as taxes by the court. The other would be to make places of public entertainment liable for the licence fee approved by the copyright appeal board, at least in those cases where the defendant did not show that the infringement was an isolated incident that occured despite due care. The task would

also be easier if they were permitted to sue for infringement of the repertoire per se, rather than individual works, and if the courts were directed to issue injunctions covering the whole repertoire.

The granting of an injunction usually involves a court appearance which is expensive, and as a practical matter, a court will be reluctant to impose much by way of penalty in contempt proceedings unless the breach of the injunction is clearly deliberate. So some benefit could be derived from permitting plaintiffs to claim a declaration of infringement in a summary way so that the declaration could be brought forward in later proceedings on the theory of "one dog, one bite".

Collectives responsible for collecting royalties on the compulsory licencing of music and photocopying collectives (if they are created) will also have special problems. In order for such schemes to function satisfactorily, some mechanism must be found to ensure that users, that is to say record-pressers, libraries and the like, maintain a system of accounts that copyright owners can have confidence in. This argues strongly in favour of a mechanism for establishing rules for the keeping of accounts and the remitting of royalties owing. In the

absence of such a system, rights owners will have to sue, either for an accounting or on the theory that the performance of a given user is so poor that it amounts to a fundamental breach of his licence and that he is, therefore, an infringer. It would probably be better to set accounting standards and improve them over the years while letting collectives apply to the courts for injunctive relief when users fail to comply with such standards.

4.8 Customs Controls

Under sections 27 and 28, certain works are placed on Schedule C of the Customs Tariff or deemed to be there because a license has been granted to reproduce the book in Canada. By virtue of the Customs Tariff provisions governing Schedule C, imported copies of works on Schedule C are forfeit to the Crown and the importers can be prosecuted for violating the Customs Tarrif Act.

There are two problems with these provisions. Firstly, taken literally, they seem to prohibit importation by the copyright owner himself, and this is how they have been interpreted in the past.(25) The second problem is that the provisions are not very practical. At one time, Canadian Customs officers may have gone into shipments of copyright materials in order to

locate pornography or other forbidden goods, but the enormous volume of copyright materials imported into Canada now precludes any effective scheme to enforce copyright through customs officials. It is probably only when customs officers are given notification of specific shipments that effective steps can be taken.

These provisions are also inconsistent with the basic principles set forth above in 1. They involve state enforcement. Moreover, since the vast majority of imported materials will be covered by copyright owned and controlled from abroad, the scheme essentially amounts to legal aid for persons who are quite capable of protecting their own interests. The impracticability of the provisions are compounded by the fact that Revenue Canada would have to constantly seek legal advice in the enforcement of these provisions. They also appear to promise more than what the community seriously intends to deliver since government cannot promise that infringing copies will not evade Schedule C.

4.9 Criminal Sanctions

The possible use of criminal sanctions to enforce copyright raises the following issues:

a. should there be criminal sanctions?
b. should the penalties be increased?
c. who should administer the criminal provisions, that is to say, who should conduct prosecutions?
d. what should the policy be on use of criminal sanctions if there are to be such sanctions?
e. how should criminal proceedings be financed?

4.9.1 Current Law

Section 25 of the Copyright Act makes it an offence punishable on summary conviction by a fine of up to ten dollars a copy to make, import or deal in infringing copies in the course of trade. The maximum fine is two hundred dollars in relation to any one transaction and the penalty can be increased to include imprisonment with hard labour of up to two months for subsequent offences. Similar penalties are imposed on persons making or possessing plates and in relation to public performances for private profit. The court

can also order distruction of plates and copies or delivery up to the copyright owner, even in those cases where no conviction is entered. Knowledge on the part of the accused is an essential element of these offences. There is no mechanism for imposing "hard labour" in Canada now, and the Criminal Code stipulates that such sentences are to be served as ordinary terms of imprisonment.

Under section 26(1) it is an offence punishable by a two hundred and fifty dollar fine to put on an infringing public performance for private profit of any dramatic, operatic or musical work. Again the penalty can be increased by two months imprisonment for subsequent offences. Under section 26(2) a five hundred dollar fine can be imposed on any person making any change or supression in the title or name of the author of any dramatic or operatic or musical work or any change in the work itself in order to perform it publicly for private profit. Here the term of imprisonment for subsequent offences can be up to four months.

Because these provisions are found in a special piece of legislation, the Copyright Act, there is an expectation that the Department responsible for administering the Act will initiate and finance prosecutions. It would be otherwise if these provisions were found in the Criminal

Code. In that case, the expectation would be that the provincial authorities would prosecute since they are responsible for the administration of justice, and the Federal government, generally, does not conduct prosecutions except in relation to cases or particular statutes where it has an interest that necessitates its involvement. An example, is the furtherance of compliance with a regulatory scheme, for the rule under the British North America Act is that the Federal government establishes criminal law and procedure and the provinces administer. The provinces also administer the reformatories where sentences of less than two years are served and the Federal government administers the penetentiaries where sentences of two years or more are served.

Because the Copyright Act offences are "summary conviction" offences, private individuals may bring prosecutions, and this may have been the expectation when these provisions were created. The Crown has a discretion to intervene in such proceedings to have them stayed if it considers them abusive. The offences require guilty knowledge and the penalties are the maximum. The courts can reduce the penalties, and in appropriate cases grant absolute discharges. The monetary limits of the fines

are low by modern standards. They have not been changed since 1924. But the limits are probably in line with what a court would impose in a typical case. Putting things differently, policy makers should not assume that increasing the maximum fine or term of imprisonment will result in a change in sentencing patterns in typical cases. Judges have a very wide discretion in sentencing and their practices in that regard will reflect the degree of seriousness that they and the community attach to copyright infringement, which is probably not very much, although increased penalties may change that attitude over the years.

As a practical matter, in most cases the consequences of being sued civilly are likely to be greater than prosecution, and judges, being practical people, will know this. In other words, for a prosecution to gain judicial sympathy, and therefore a heavy sentence, the Crown will probably have to offer some justification for prosectuion over civil proceedings.

At the very least, if criminal sanctions are to be continued, it would seem to follow that they should be given the same status as other summary conviction offences in terms of penalties, for to do less than that is to treat them not as crimes at all. Generally, summary conviction offences are punishable by up to six months imprisonment and an unlimited fine. Given the economic character of infringement, the latter penalty is most

appropriate.

The description does not end with the Copyright Act. If infringers are to be exposed to heavier penalties, it is not unreasonable to suggest that they should also enjoy the protection offered other offenders, or alleged offenders, which arise out of the division of powers under the British North America Act. Generally, prosecution of serious offences is left to the provincial authorities who have wide discretion in such matters and are expected to exercise this discretion to avoid abusive prosecutions. As well, there are more serious criminal offences under the Criminal Code which can be brought to bear on copyright infringers or which might be brought to bear on them.

For example, if infringement is made an offence triable on indictment, then persons knowingly in possession of infringing articles could be prosecuted for possession of property obtained by crime under section 312 of the Criminal Code. In some circumstances, section 312 may apply since section 21 of the Copyright Act deems infringing copies to be the property of the copyright owner and thus dealing in them may constitute theft. But the two most important current Criminal Code offences for copyright purposes are conspiracy under

section 423(2) and forgery of a trade mark under sections 364 and 365. Where infringers try to pass off infringing goods as being authorized, they are likely to be involved in trade mark forgery. That is an offence punishable either on summary conviction or on indictment by up to two years imprisonment. Conspiracy is punishable on indictment only and by up to two years imprisonment. The offence of conspiracy would be committed where two or more persons agreed together to effect an unlawful purpose e.g. copyright infringement.

All of this is brought forward to illustrate two important points for policy makers. Firstly, the present law is not toothless and if there is a serious problem with criminal infringement, one would expect these provisions to be used frequently. They are not. Secondly, copyright is already in the Criminal Code, and it would be inefficient to have some sanctions in the Copyright Act and others, perhaps the more serious sanctions, in the Criminal Code.

As a point of reference, policy makers should consider the analogous offence of theft. Petty theft, that is to say theft under two hundred dollars, is punishable on summary conviction or punishable when tried on indictment by up to two years imprisonment. "Theft over", that is to say, theft of property over two hundred

dollars is punishable by up to ten years imprisonment.

Theft is an offence where the Crown has an election to proceed summarily. If it seems desirable to permit private prosecutions, then the offence of theft may provide a model for copyright because the Crown could permit such proceedings by making the election to proceed summarily.(27)

4.9.2 Should there be Criminal Sanctions

A great deal more could be said in describing criminal sanctions and there are subtle issues of deterrence, retribution, reformation etc., but there are major obvious considerations that control the issue. It could be said that criminal sanctions are not as effective as civil measures, they are not as cost effective and they involve the state doing poorly for rich owners of copyright what they can better do themselves and that most owners will be foreigners. Copyright in Canada very ably made the point about private rights privately enforced.(28) Creation or continuation of criminal sanctions will give rise to private expectations which the state does not intend to meet or cannot meet. But these are arguments about how the sanctions should be used or whether they should be used, not whether they should exist. The same could be said about the argument

that they are useless because they are rarely used.

Many arguments can be made for keeping criminal sanctions and for creating new ones. It can be said, for example, that the public should have greater respect for copyright and denouncing infringement as a crime is a means to that end. It can also be said that infringement is rampant and that to suggest otherwise is to exhibit the all too prevalent attitude that copyright is a trivial matter. But this sort of debate is philosophical and speculative. There are better, practical considerations strongly arguing for criminal sanctions.

Firstly, there are provisions in the general criminal law that apply to forgery of trade marks and conspiracy. One might remove forgery of trade marks from the Criminal Code, but conspiracy will remain, and this means as a policy matter, that criminal sanctions will continue and it becomes then a question of whether the sanctions should be tailored to extract the maximum benefits that they can offer.

Secondly, whatever may be said about the prevalence of criminal infringement or the relative effectiveness of criminal as opposed to civil measures, in principle, at some time and at some place, someone is

going to commit an act of piracy that will call for public condemnation, and an enforcement policy that does not take this into account will be seen to be wanting.

Thirdly, there is no guarantee that a policy based on civil enforcement will work, or at least that it will always work, and it is plain prudence to keep the possibility of imposing criminal sanctions in reserve.

Fourthly, and this is more minor, there are a number of optical advantages in providing for criminal sanctions. To some degree, enforcement will depend on public awareness and that awareness will be increased by the existence of criminal sanctions. The public generally, or at least an important segment of it, is more likely to know of criminal as opposed to civil sanctions. The existence and use of tougher civil remedies will be more acceptable in relation to activities which are also criminal. Foreign countries, and in particular the United States, have criminal sanctions and copyright interest groups in those countries are unlikely to go to the effort necessary to understand how civil enforcement works in Canada, and they will expect criminal sanctions.

Finally, copyright infringement can be an international crime and the existence of criminal sanctions in Canada will give Canadian police a mandate to co-operate with foreign police forces.

4.9.3 Should the Penalties be Increased?

The answer seems obvious when the question is phrased, "Should the courts have a discretion to impose greater penalties than they do now?" If greater penalties are appropriate and permitted, the courts will impose them. If they are not appropriate, they will not be imposed.

4.9.4 Who Should Administer Criminal Sanctions?

In the normal course, if copyright infringement is to be a crime, then the sanctions should be part of the general criminal law, that is to say, they would be located in the Criminal Code. Strong sentiment can be expected from within and without government for a federal presence, i.e. sanctions within the Copyright Act administered by a federal department. Some interest groups among the copyright industries will believe they can influence the department responsible more easily than provincial attorneys-general and they may be right. Within the federal bureaucracy there will be affection for running an active program with a budget, and seen to be doing something for creators. As well, there will be the argument that somehow the federal government will do a better job than the provinces, a proposition for which there is no supporting evidence.

If the federal government opts to accept

responsibility, it must decide how prosecutions are to be financed, how cases are to be selected for prosecution, and how it will react to criticism when it goes to court and loses, because, in order to carry on such a program, one must be prepared on occasion to be a gracious loser. The obvious alternative is to leave prosecutions to the provinces in the first place and only exercise the federal right to prosecute when it becomes necessary or when requested by the provincial authorities.

4.9.5 What should the Policy be on Use of the Option of Prosecution?

There are three possible approaches. The first is to treat copyright infringement as any other crime and to prosecute under circumstances where prosecutions would ordinarily be taken in relation to other offences. This posits provincial administration. It is the middle ground. At one extreme would be a special program aimed at achieving a high level of compliance. That posits federal administration. The other extreme would be a program of involving criminal sanctions only when civil enforcement has broken down. This also posits federal administration because it involves deviation from the norm.

4.9.6 How Should Prosecutions be Financed?

If prosecutions are conducted by provincial authorities, much of the cost will be borne in the ordinary

course by fixed costs such as police and prosecutor salaries. Special effort could be made by allocating higher priority to copyright if this appears necessary and more infringers will be prosecuted.

The same may be true if the Federal Department of Justice assumes responsibility. It will not enjoy the economies of scale and fixed costs available to the provinces. Outside of large centres, special prosecutors will have to be hired, and in any event, special provision will have to be made for attendance of federal prosecutors on remands, etc.

What is important is that policy makers know that if there is to be a federal commitment to prosecute, money must be made available, and the chosen figure is likely to be too low to pose much of a threat to infringers and yet too high to be accepted, or defended year after year.

4.10 Evaluation of Present Enforcement Provisions

Where copyright has been infringed in Canada, a copyright owner has a right to take proceedings to recover all infringing copies regardless of whether the person against whom the proceedings are taken is aware that the copies infringe. Liability is absolute or strict. Moreover, the copyright owner has the right to collect damages equivalent to the sale price of the articles which a defendant has parted with. This remedy is anomalous because the measure of damages is greater at the retail level than it is at the wholesale or manufacturer's level. Moreover, it is not available against imported articles unless at the time the articles were imported the importer knew that he was importing piracies. Persons who knowingly infringe, that is to say, persons who import or deal in infringing articles knowing that they are infringements, are also exposed to recovery for actual damages and may be obliged to make an accounting of profits in addition thereto. The same is true of persons who engage in acts of direct infringement, that is to say, those persons who do any of those things which are declared by section 3(1) to be the exclusive right of the copyright owner. So as a practical matter, the measure of damages is either the greater of conversion damages under section 21 or actual damages, although

the courts have a discretion to award an accounting of profits in addition to either of these measures and the courts also have a discretion to impose punitive or exemplary damages as well. It is a very tough law despite the weakness of the criminal provisions, the major anomalies being the treatment of imported copies or piracies and the fact that there are no mandatory statutory damage provisions for cases where infringing articles are not involved.

The present enforcement provisions rely very heavily on the concept of property for their moral justification. In this lies their strength and their weakness. They work very well where tangible property, e.g. infringing articles, are involved. They work very poorly when no tangible property is involved because they require an assessment of the damage or injury done to a right which is conceptual, under circumstances which are frequently unique. Often the damages must be speculative. If a work is infringed by a public performance in Toronto, that may diminish the value of the copyright in Canada, but by how much? By giving the work and the artist exposure, the infringer may have enhanced the value of the copyright. The "damages" may have to be calculated with regard to what the infringer

or others in his position would have been willing to pay if forced to do so in order to use the work.

There is another way of looking at copyright that is more useful for purposes of assessing compensation and enforcement generally. It can be said that the purpose of copyright is to create a flow of income to authors which will be somehow proportional to the value placed on the work by the community, as evidenced by the degree of use that is made of the work. This is probably the rationale most frequently advanced to justify copyright as property. Treating copyright as a property right is a means towards the end of inducing the desired income flow. It probably makes more sense in enforcement proceedings to accomplish all of this directly, without going through the property rationale. A method for calculating compensation could be devised and a percentage factor assigned to arrive at an appropriate award to be imposed in cases of unauthorized use. If the percentage is high enough, it will subsume the property rationale because it will exceed most awards made on a trespass to property basis, and in any event, copyright owners can be left to seek "damages" as opposed to "compensation" for use if they believe the former will be greater. If the award equals or is somewhat greater than the likely market value of the copyright, then this will also tend

to respect property in copyright because it will predispose users to seek permission to use in order to avoid the risks and expense of legal proceedings.

If an enforcement policy is to succeed, it probably needs a philosophical basis that the community and the courts find persuasive. But there is nothing to stop that basis being selected pragmatically. The obvious difficulty is how do you select the figure. This will be dealt with in some detail in 6. , but for present purposes, it should be pointed out that regardless of what figure is chosen, within reason, things will tend to be self adjusting in the sense that if it is too high, users will tend to be more cautious, and in any event, the choice of the figure is essentially the choice of the threshold at which infringers will be sued, and that will always be arbitrary. Put differently, it is probably more important to have a mechanism for arriving at a figure in the first place than it is to be completely accurate.

All of this can be placed in context when the size of the enforcement problem is appreciated. The following is a table of copyright claims filed in recent years with the Federal Court of Canada:

YEAR	TOTAL NUMBER	PERFORMING RIGHTS SOCIETY ACTIONS	OTHERS
1971	7	0	7
1972	3	1	2
1973	11	4	7
1974	40	29	11
1975	103	86	17
1976	33	15	18
1977	18	7	11
1978	51	24	17
1979	67	44	23

The Federal Court segregates its files according to subject matter so that it is possible to establish the volume of copyright litigation. Provincial courts do not break their files down into this fine detail and copyright claims are frequently pursued in the provincial courts. But a comparison of reported cases tried in the Federal Court and in the provincial courts suggests strongly that the Federal Court handles about half of the case load. The

case load is very small for a country of twenty-five million people. This assessment is corroborated by similar figures for criminal proceedings. The following table on enforcement of criminal sanctions by the Royal Canadian Mounted Police and the Federal Department of Justice was obtained from the Canadian Copyright Office.

Number Investigations		Place	Results	Fines Levied
1973	7		No charges laid	
	1	Calgary	Charges withdrawn	Nil
	1	Settler, Alta.	Conviction	$278.00
1974	1		No charges laid	
1975	1	Montreal, P.Q.	Conviction	$240.00
1976	1	Winnipeg, Man.	Conviction	$400.00
1977	1		No charges laid	
	1	Montreal, P.Q.	Conviction	$300.00
	1	Montreal, P.Q.	Charges withdrawn	Nil
1978	4		No charges laid	
	1	Montreal, P.Q.	Still before the courts	
	1	Montreal, P.Q.	Conviction	$3,600.00
1979	2		No charges laid	
	1	Montreal, P.Q.	Still before the courts	
	2		Still under investigation	

Again, an examination of reported cases indicates that these figures are approximately one-half of the universe because provincial authorities appear to be prosecuting an equal number of infringers. All of this suggests that the level of litigation is very low, and the consequence of error small. In any event, if one chooses a figure of 20% when a better figure might be 15%, will the error exceed the savings in costs that will result from having the figure in the first place?

5. MAJOR POLICY RECOMMENDATIONS

These recommendations and the specific recommendations that follow should be evaluated in the light of the criteria discussed in 3, as should the present law. These criteria will not be canvassed in relation to each proposal. The criteria can be summarized as:

1. Effectiveness
2. Economy
3. Flexibility
4. Degree to which expectations will be created and met
5. Fairness
    (a) between plaintiffs and defendants
    (b) between plaintiffs as a class
    (c) between defendants as a class
    (d) between defendants to an action
    (e) in allocation of ultimate liability
6. Minimization of delay and risk
7. Control of variance from desired norms
8. Accountability

5.1 Private Enforcement

The major policy lever should be enforcement of rights by copyright owners. This is recommended because it is believed to be most effective and economical because of the greater ease of proof and because civil proceedings

can be commenced and usually settled without extensive investigation in advance of proceedings. This can be compared to criminal proceedings where a clear case should be established before charges are brought. Civil proceedings are more flexible in that greater resources can be brought to bear quickly on specific problems. There are more likely to be large numbers of lawyers trained and available to fill in pre-printed civil forms than police and prosecutors. Put differently, if lawyers are needed to conduct civil proceedings they are available to owners. The policy delivers to copyright owners what it promises, the best possible chance at compensation. The policy can be structured to produce a high level of fairness and reduced level of risk and delay. The policy accepts a level of variance from desired norms while keeping variance within hopefully acceptable limits. Because effectiveness is likely to be high and no unreasonable expectations are created, the policy is likely to meet public expectations; in other words, it is a policy which should meet standards of public accountability.

5.2 Public Support for Private Enforcement

The next major recommendation is that the revised law should support private enforcement by increasing the degree and certainty of return on

enforcement expenses, so that copyright owners will have an incentive to assert their rights when they are violated.

5.3 Use of Summary Judgment

In order to achieve the recommendation set out in 5.2 it is recommended that maximum use be made of summary judgment procedures. Towards this end, the law should, when ever possible, impose strict but limited liability on persons creating or dealing in infringing articles or engaging in infringing acts. By strict liability is meant liability to which innocence or lack of knowledge is no defence. By limited liability is meant a restriction on the upper limit of liability of persons who are not direct infringers and who act innocently. Coupled with these policies is the policy of calculating the basic strict but limited liability by a statutory formula yielding a liquidated sum suitable for summary judgment.

5.4 Assimilation of Importers into the Class of Direct Infringers

As much as possible, plaintiffs should be given the same remedies in relation to unauthorized copies made abroad as they enjoy in the case of domestic infringement. The degree to which this will be possible will largely turn on the treatment of authorized copies made abroad that copyright owners may seek to bar from Canada.

6. SPECIFIC RECOMMENDATIONS

The specific recommendations set out below are calculated to advance the general policy of creating as infringement free a business environment for copyright owners as can be achieved with due regard to equity and fairness to persons caught up in the enforcement process. They are consistent with the broad measures recommended in 5. and they should be assessed in relation to the criteria set out in 3. The recommendations are weighted heavily in favour of measures for dealing with infringing articles as opposed to infringements not involving articles. There are several reasons for this. Firstly, trade in infringing articles lends itself well to effective enforcement. Symmetry might dictate a weakening of remedies against infringing articles so that remedies in cases of infringing performances, etc. would not be held up to invidious comparison, but this is resisted. Secondly, effective remedies against articles will solve most problems. Seizure of a videotape will, for example, prevent further infringing performances. Articles pose a far greater threat of damage. Infringing performances, on the other hand, if they are likely to cause widespread damage, will most likely take place through the medium of a regulated industry, with inherent conditions of solvency and responsibility of potential defendants. Public performances in bars, hotels, etc. present ample opportunity for nuisance infringements, but the potential damage created by

any given infringement is relatively small.

6.1 There should be strict liability for limited statutory compensation.

This is the major recommendation. Persons dealing in infringing articles in the course of trade should be made strictly liable for infringement. That is to say they should be liable regardless of their state of mind or knowledge. The degree of exposure should be limited so that the possibility of innocent parties being found liable will not interfere unduly with trade in copyright materials. Such a party will only be required to pay such an amount when it is not paid by someone else, for example, in the case of insolvency on the part of the source of the goods. The purpose of this recommendation is to facilitate summary resolution of disputes and to encourage owners to sue by reducing the risk of not collecting anything by way of compensation after they have undergone the expense and risk of enforcement proceedings.

6.2 The method of calculating statutory compensation should yield a liquidated sum suitable for immediate summary judgment.

The purpose of this recommendation is to avoid,

wnere possible, the delay and expense of an assessment of compensation. Present section 21 is an obvious model. The sum should be calculated on the basis of the sale price of the articles involved.

6.3 In the absence of knowledge at the time an article is acquired that it infringes, end users should be immune.

This is a reasonable quid pro quo for 6.1 and 6.2 and is probably necessary to avoid creating too great an interference in trade in copyrighted articles. The immunity would apply to persons acquiring articles for end use as end users. It would not apply to persons who create articles for their own end use or to persons who use infringing articles for some further infringing purpose, for example, an infringing public performance. The possibility of copyright in computer software illustrates the desirability of this policy, since the cost of such material and the consequent impact on trade of strict liability on end users is probably too great.

6.4 There should be a right for copyright owners to oblige persons believed to be in possession of or using infringing articles in the course of business or trade to give discovery as to the source of such goods.

This is a reasonable quid pro quo for the immunity

extended under 6.3. Exposure to discovery is restricted to articles possessed or used in the course of trade because a general right of discovery against private end users seems an unnecessary interference in their affairs. Unless the party seeking discovery extends immunity from further proceedings to persons sought to be discovered, the party seeking discovery should be liable for costs. Unless the party against whom discovery is sought seeks to contest the claim for discovery, the procedure should take the form of a notice requiring a written return. Returns should be privileged in that the party giving discovery should not be liable for injury caused by returns made in good faith. Perfection of this procedure will require the development of appropriate court rules and forms, and this can be more economically achieved if the practice is restricted to the Federal Court of Canada. Although this recommendation may appear narrow and technical in nature, it has practical significance. As things presently stand, a copyright owner can obtain discovery by naming a party as a defendant in an action but the copyright owner may be relunctant to do so because the defendant may be a valued present or future customer. If end users are to be immune, some independent means of discovery from them seems desirable since they will not be open to suit.

6.5 Discovery Proceedings per se should not be privileged.

The discovery recommendations set out in 6.4 could lead to abuse. Specifically, they could be used by parties to slander the goods of rivals because parties subjected to discovery will come to look on the goods in question as being infringements. As things stand now, such discovery proceedings would be privileged as a judicial proceeding. A revised statute should provide that the exercise of the independent right of discovery is only privilege if exercised in good faith. Moreover, when such discovery is sought, the source of the goods should be entitled to appear and seek a declaration that the party seeking discovery is not entitled to the copyright he claims and the source of the goods should also be entitled to claim remedies for slander of title. This issue is dealt with in 6.

6.6 All infringing articles should be treated equally and attract the same liability to persons dealing in them.

This is an obvious recommendation. In the past there has been doubt as to whether phonorecords, magnetic and vidoe tapes etc. could constitute infringing copies.

6.7 Similarly, the same remedies should be available for imported articles as against infringements that originate in Canada.

Specifically, the proviso should be abolished that presently appears to require that an article is only an infringement when the person who imports knows it infringes.

6.8 Pursuant to 6.7 importers should be assimilated into the class of direct infringers as far as unauthorized copies are concerned so that all remedies will be potentially available to copyright owners against a defendant that can be found and sued in Canada.

This overcomes the anomaly that arises when in relation to similar acts of infringement, different remedies are available to different plaintiffs because in one case the source of the goods is in Canada and in another case it is not. This means that importers will be liable for actual damages as well as limited strict liability as described in 6.1.

6.9 The liability of importers as provided in 6.8 should be restricted to transactions in unauthorized copies.

Pressure can be expected for measures to permit copyright owners to exclude authorized copies of their works

which have been lawfully made in foreign countries, typically in the United States. The policies of strict liability and assimilation of importers into the class of direct infringers is substantially justified by the likelihood of innocent parties being able to transfer the impact of enforcement onto the ultimate source of the goods or at least onto a party that deals with the goods knowing they infringe. Only in very limited circumstances will this be possible with authorized copies made abroad.

6.10 If liability is created against persons importing or otherwise dealing in authorized goods imported from abroad, it should be restricted to actual damages against persons who know that sale or distribution of the goods is not authorized in Canada.

Although it is beyond the scope of this paper to enter into the rationale for market segregation, the ultimate justification is probably the protection of Canadian manufacturers and distributors from competition from foreign deletes and remainders. From this follows recommendation 6.11. The present recommendation is necessary in order to avoid creating doubts about all imported goods subject to copyright.

6.11 The right to sue for damages in relation to importation of authorized copies produced abroad should

be restricted to parties who are manufacturers or distributors of the articles in question and then only the degree of actual damage.

This keeps the impact of market segregation limited to those specific cases where it might be justified. Anything else is unnecessary and will meet with justified opposition from major user groups such as educational authorities. In a nut shell, if in a given set of circumstances there is no actual damages and the policy is not therefore justified, there will be no cause of action.

6.12 The basic measure of statutory compensation, that is to say, the strict but limited liability of persons dealing in infringing articles should be 40% of the price at which the infringing articles are initially introduced into trade.

This recommendation must be read in conjunction with 6.13 to be thoroughly understood. The figure reflects the considerations set forth in 2 and 3.

There are two obvious measures. The first is one hundred percent of the price at which the articles are introduced into the market. That would be an obvious modification of present section 21. The other is nothing. Fifty percent splits the difference. The figure of forty percent is chosen for several reasons, none the least of which is that, if anything, it is on the high side and, therefore, favours the overall policy of encouraging private enforcement by copyright owners. But there are more subtle reasons. The scheme is that the innocent "deemed infringers" will pay if the actual infringers do not. Obviously there must be a limit on such liability and it seems fairly clear that such liability should be within, or at least not substantially greater, than a typical gross profit margin so that the risk assumed by innocent parties dealing in copyright goods in relation to infringement will not be substantially greater than other accepted business risks.

Why forty percent? Canadian authors appear to stipulate for a royalty of 15% of the retail price of their books. American authors appear to receive a customary 10%. If we assume that the factor gate price of an article is 40% of the retail price and that distribution costs will make up another 25% with retail mark-up consuming 35%, then 40% of the factory gate price comes to 16%. Similarly, in the recording industry, what may be described as the copyright input of a tape or record

appears to be in the order of 40% of the factory gate price. This includes royalties, performers' fees, etc. So 40% is suggested as a reasonable and educated guess as to the typical amount that would be arrived at when calculating reasonable compensation for use of copyright under 6.15.(29)

6.13 The procedure for setting the liquidated sum under 6.12 should be codified as follows:

a. In relation to unauthorized copies and starting with retailers as defendants, a copyright owner will be entitled to claim delivery up of infringing articles and pecuniary compensation equal to 40% of the price at which a particular defendant has sold the articles he has parted with.

b. A defendant will be entitled to reduce the measure of compensation and to claim an accounting or set off of proceeds from seized goods if he

i) identifies the source of the goods; and,

ii) establishes the price at which he obtained the goods;

iii) swears he was unaware the goods infringed.

c. Compliance with subs i, ii, and iii of b. will reduce the measure to 40% of the acquisition price from the particular defendant's source.

d. The source referred to in c. can further reduce his liability and that of his customer by meeting the criteria set out in b.

e. In relation to the sums established by this process, a plaintiff will be entitled to immediate judgment and execution without prejudice to the right to prosecute other claims against the same defendants, for example, increased damages against knowing infringers.

f. In the case of uncooperative infringers, provision will have to be made to compel production of business records necessary to establish levels of sales.

6.14 In those cases not covered by 6.13 and 6.14, a copyright owner should be entitled to at least reasonable compensation for the use of his copyright set with regard to what a willing user would pay a willing copyright owner

for use of the copyright material.

The theoretical basis of this recommendation is fairly obvious. It is a reasonable royalty and is a form of statutory damage or compensation. Its practical effect may not be that obvious. It means, in effect, that a copyright owner would be able to base the quantum of his claim on data, such as compensation, paid by the parties, or to the parties, for similar uses, practices in the trade and opinion evidence of persons experienced in the business.

6.15 Copyright owners should have an absolute right to seize or obtain the destruction of infringing plates or masters. They should also have the right to seize and dispose of other infringing articles, subject to the right of non deliberate infringers to apply for an accounting of proceeds from the disposal of such articles or for directions as to their disposal. The court's powers on such an application should be discretionary and should include the power to order the return of infringing articles to non deliberate infringers (upon payment of compensation) where justified by undue hardship to the defendant.

6.16 The courts should have a discretion to order a defendant to arrange the recall of goods.

6.17 The law governing proof of facts should be codified as follows:

1. The presumptions of authorship and ownership arising out of statements on the fact of copyright articles should be expressed in terms of article 15 of the Berne Convention and should accrue to authors, publishers or those claiming under them as plaintiffs. Such statements should also be assimilated into the business document rule for the benefit of defendants.

2. Authors should be first owners of copyright and transfers must be evidenced by written instrument made at the time of transfer or nunc pro tunc.

3. Transfer documents, employment contracts and other documents evidencing ownership of copyright should be treated as business documents and, therefore, proof of the truth of their contents inasmuch as they are created and kept in a manner as would qualify them at common law or under the Evidence Acts.

4. In copyright proceedings a work should be presumed to be in copyright and the plaintiff should be presumed to be the owner unless, prior to trial, opposing parties obtain leave

to contest these issues. Then, the onus of proof should fall on the plaintiff.

5. Persons claiming copyright should be taken to warrant their title to defendants, who shall obtain a complete release upon settlement or satisfaction of a judgment so long as they act with due care and in good faith.

6. Plaintiffs should be required to give notice of action to all persons who may be prejudicially affected by the relase of a defendant. All such persons who do not join in the action shall be taken to have foregone their claims.

7. Collectives should be presumed to own the copyrights listed in their repertoires, subject to 4.

6.18 The following policy should apply in relation to proof of an infringer's state of mind.

1. There should be limited strict liability on all infringers, direct

and indirect. In other words, state of mind should be irrelevant.

2. Direct infringers, that is to say, persons who do anything that is now the exclusive right of a copyright owner should be liable for actual damages regardless of their state of mind.

3. In the case of indirect infringers, liability for actual damages should attach where the plaintiff shows that a reasonably knowledgeable person in the trade would have suspected that the goods in question were made or otherwise obtained in violation of the rights of a copyright owner or those claiming under him.

4. In the case of authorized copies imported from abroad, the test should also be objective. Liability should only attach where it is shown that a reasonably knowledgeable person in the trade would suspect the owner of copyright objected to the importation or that the goods had been created or

obtained in violation of the rights of the copyright owner or those claiming under him.

5. Proof of actual knowledge should be on the plaintiff.

6.19 The cause of action in relation to importation to authorized copies made abroad should accrue to manufacturers and distributers only and as such.

6.20 The revised statute should set forth a list of factors to be taken into account in assessing damages and other pecuniary awards against deliberate infringers. The list should be open ended and include:

a) The actual damages suffered;
b) The benefits enjoyed by the defendant;
c) The flagrancy of the infringement;
d) The need for deterrence;
e) The value of the material taken to the defendant or others.

This list parallels Keyes/Brunet but is open ended and excludes the question of a party's behaviour during the litigation and the use of orders in council to expand the list, that being left to the judges themselves.

6.21 Plaintiffs should be given the option of foregoing all pecuniary claims in favour of recovery of reasonable enforcement costs.

6.22 Recommendation 6.25 should not apply to moral rights claims but all other remedies should. 6.25 is excluded because it would open the way to nuisance moral rights claims.

6.23 There should be explicit authority to grant a pecuniary award in lieu of or in addition to an injunction and to make a pecuniary award and grant other relief in relation to slander of title. As well, the revised statute should provide for relief over, contribution and indemnity among infringers. These measures are desirable to ensure that the Federal Court has complete concurrent jurisdiction in copyright.

6.24 There should be explicit jurisdiction to grant declaratory judgments.

6.25 Provision should be made for the creation of rules to govern the keeping of records, accounting procedures, etc. by persons making use of copyright material under compulsory licensing and collective schemes. These rules should be enforceable through the courts by means of injunction proceedings.

6.26 Performing rights societies and other collectives should be entitled to sue and obtain injunctions in relation to infringement of their repertoires as well as in relation to individual works.

6.27 Proprietors of places of public entertainment should be strictly liable for acts of infringement which take place on their premises through public performances. In the case of charitable institutions or enterprises, liability should be restricted to cases where a reasonable person would suspect an infringement could take place and liability should be restricted in quantum to costs and the fee approved by the Copyright Tribunal.

6.28 Copyright owners should have priority of execution for their costs and for the statutory compensation provided for under 6.1, 6.2 and 6.15, and 6.23, but innocent defendants who are not direct infringers or who are not shown to have acted under circumstances where the objective test of knowledge would apply should have priority over other claims. This is to prevent innocent infringers made strictly liable being forced to "subsidize" increased damage awards when the party ultimately responsible does not have sufficient assets to meet the total award.

6.29 The present criminal provisions in the Copyright Act should be abolished and replaced by provisions in the

Criminal Code making it an offence to knowingly infringe copyright to a degree calculated to adversely affect the interests of a copyright owner and by a further offence of knowingly being in possession of a copyright article that has been made or obtained in violation of the rights of the copyright owner or those claiming under him. Those offences should be triable on summary conviction or on indictment at the election of the Crown. In drafting such a provision, an effort should be made to couch the offence in criminal law rather than copyright law language in order to avoid unnecessary inclusion of civil elements in the offence. The following may be a suitable format:

> Everyone who without colour of right
>
> a. makes for sale or hire any article,
>
> b. sells or lets for hire or by way of trade exposes or offers for sale any article,
>
> c. distributes for purposes of trade any article,
>
> d. by way of trade exhibits in public any article,
>
> e. imports for sale or hire any article, or
>
> f. does any other act for profit in relation to a work in which copyright subsists,
>
> which he knows may prejudicially affect the copyright in Canada of any person whether ascertained or not, is

a. guilty of an indictable offence and is liable to imprisonment for ten years where the act is done in relation to articles where the value of the articles exceed five thousand dollars; or,

b. is guilty (i) of an indictable offence and is liable to imprisonment for two years, or, (ii) of an offence punishable on summary conviction, where the value of the articles involved do not exceed five thousand dollars or where no articles are involved.

Footnotes

1. Copyright in Canada. Proposals For a Revision of the Law, A.A. Keyes and C. Brunet, Consumer and Corporate Affairs Canada, p. 185.

2. Liability is strict under the Patent Act and under The Trade Marks Act, two analagous statutes.

3. Overseas Tankship (U.K.), Ltd. v. Morts Dock & Engineering Co. Ltd., (1961) A.C. 388, P.C.

4. Victoria Laundry (Windsor), Ltd. v. Newman Industries Ltd., (1949) 2 K.B. 528, C.A.

5. It can be argued on the basis of the texts and authorities that there is a section 22 defence to a section 21 claim. See for example the Judgement of Hudson J in Underwriter's Survey Bureua Ltd. et al v. Massie & Renwick Ltd., (1937) S.C.R. 265 at 269 and Fox, The Canadian Law of Copyright and Industrial Designs, 2nd Edition at p. 473. In a nut shell, it is argued that the limitation period under section 24 applies to section 21 claims as being "in respect of infringement" and that section 22 also applies. Grammatically, section 24 cannot bear this interpretation unless the word "infringement" is made plural or the article "an" precedes it. But little turns on this, given the narrow scope of section 22. Common sense would suggest that the limitation period that applies to section 21 is the term of copyright itself, otherwise infringing articles could circulate freely after the limitation period passed.

6. Sutherland Publishing Co. Ltd. v. Caxton Publishing Co. Ltd., (1939) A.C. 178.

7. See Second Edition page 467.

8. As indicated in 5 above, there is language in the authorities to the contrary, but they ignore the plain language of section 22. In order to apply grammatically, section 22 would have to be changed to make "infringement" read in the plural, thus broadening the coverage of section 22.

9. See Clarke, Irwin & Company Limited v. C. Cole and Company Limited, 19 Fox Pat. C. 143: Godfrey, MacSkimming & Bacque Ltd. et al v. Coles Book Stores Ltd., (1976)13 CPR (2d)89 Simon & Schuster Inc. et al v. Coles Book Stores Ltd., 23 CPR (2d), 43; Fly by Nite Music v. Record Wharehouse, 20 CPR (2d) 263.

10. These cases turn on the possible meanings of the phrase "or would infringe copyright if it had been made within Canada". Policy makers can speculate. The words may be a choice of law clause and they may relate to the concept used in section 4, "protection extended ... to foreign countries" and

the test to assume that the Canadian Act is in force in the foreign countries - e.g. the United States.

11. See, for example, s. 13 of the Ontario Sale of Goods Act, R.S.O. 1270 c. 421.

> **13.** In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is,
>
> (*a*) an implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass;
>
> (*b*) an implied warranty that the buyer will have and enjoy quiet possession of the goods; and
>
> (*c*) an implied warranty that the goods will be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

12. Sutherland Publishing Co. Ltd. v. Caxton Publishing Co. Ltd., (1939) A.C. 178.

13. See section 21 of the Judicature Act, R.S.O. 1970 c. The corresponding section of the Federal Court Act, s. 44 does not speak of damages in lieu of or in addition to an injunction, but the Exchequer Court has awarded notional damages, $5,000 in Underwriters' Survey Bureau Ltd. et al v. Massie & Renwick Ltd., (1942) Ex. C.R. 1.

14. See Copyright in Canada, p. 189.

15. See Pro Arts Inc. v. Campus Crafts Holdings Ltd. et al, (1980) 28 O.R. (2d) 422.

16. The pecuniary recovery under section 21 of the Copyright Act may qualify as a "claim under a statute under Rule 33" of the Ontario Rules of Practice but may be precluded as being in the nature of a penalty.

17. See article 753(1) C.P.C.

> "Le demandeur peut aussi faire saisir avant jugement:
>
> 1- le bien meuble qu'il est en droit de revendiquer à titre de propriétaire, de gagiste, de dépositaire, d'usufruitier, de grevé de substitution, de substituer ou de vendeur impayé",

Procedure under this article is analogous to "replevin".

18. American Cyanamid Co. v. Ethicon Ltd. 2 W.L.R. 316. The rule in Ethicon is constrained somewhat by public interest considerations. For example, Osler J. made the following comment in Drake v. Wortmann, 27 O.R. (2d) 707 at 710, (Ont. Divisional Court):

> Whatever may be the situation when patents are in issue or the protection of undoubted trade or business secrets, we are not prepared to say that in a case where a restrictive covenant in an employment contract is at issue, the relatively modest standard adopted in *American Cyanamid* is appropriate. The Court turns its face against such a covenant in an employment contract, and it is incumbent upon the plaintiff to show that there is at least a *prima facie* case that it will be successful at trial before the Court will grant its aid by issuing an interim or temporary injunction.

19. This policy is set out in the Canada Evidence Act, section 5.

> 5. (1) No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.
>
> (2) Where with respect to any question a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial Act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence.

20. Ownership of Copyright in Canada, prepared for the Research and International Affairs Branch, Consumer and Corporate Affairs, Canada, Ottawa, May 22, 1980.

21. See Circle Film Enterprises Inc. v. Canadian Broadcasting Corporation, (1959) S.C.R. 602.

22. See Ares v. Venner (1970) S.C.R. 608.

23. See Canada Evidence Act, section 30.

24. P. 183.

25. See, for example, the "Varcoe Ruling" reproduced at page 91 of the Ilsley Royal Commission Report on Copyright, Ottawa, 1957.

26. There is no longer any means by which such a sentence could be served in Canada.

27. In recent years, questions have been raised as to the right of the Federal Crown to prosecute criminal offences. If the policy suggested above is adopted, attention will have to be paid to constitutional questions when drafting. It appears clear that power to prosecute can be given to the Crown in the right of Canada by appropriately worded legislation since copyright is an explicitly enumerated head of Federal authority. See R. v. Aziz, 35 N.R. 1 and R. v. Hauser (1979) 1 S.C.R. 984. The decided cases leave open the question of Federal authority to prosecute purely criminal offences, but it seems fairly obvious that Parliament can designate other prosecutors in addition to provincial attorneys-general as a matter of criminal procedure although it may not be able to oust an ultimate provincial right to supervise such proceedings, e.g. by staying them.

28. P. 185.

29. There appear to be no studies giving clear and positive indication as to royalty and mark up levels. Statistics Canada figures are incomplete in that there are no figures for a complete chain of distribution. The mark up on books imported from abroad (these books form 75% of the Canadian consumption) is 75% to first point of delivery in Canada, (over entry cost). The corresponding mark up for Canadian published books is 60% approximately. For records, the typical album price at first point of delivery in 1977 was $4.20 on a suggested price of $6.00. The identifiable cost of copyright and master tape input for the industry is approximately 30% indicating an actual cost in excess of that amount at the factory gate.